

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK E. LASH

Claimant

VS.

K-MART CORPORATION

Respondent

Self-Insured

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Docket No. 225,718

ORDER

Respondent appeals from the preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Floyd V. Palmer on April 16, 1998.

ISSUES

The Administrative Law Judge granted claimant's request for medical treatment, finding claimant had shown just cause for his failure to notify respondent of his accidental injury within 10 days. Respondent seeks Appeals Board review of that finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record provided and for purposes of preliminary hearing, the Appeals Board finds that for the reasons expressed below, the Order of the Administrative Law Judge should be affirmed.

Claimant began working for respondent in September, 1989 as a repack worker. His job duties involved unloading merchandise from trucks, breaking down boxes, boxing up items, and lifting boxes from shelves.

Whether claimant suffered accidental injury arising out of and in the course of his employment is not disputed. What is disputed is whether claimant provided timely notice to respondent or had just cause for exceeding the ten-day limits of K.S.A. 44-520. The Appeals Board must first determine a date of accident. Claimant argues for an accident date after August 11, 1996. But the evidence fails to establish a permanent worsening of claimant's condition after that date. Therefore, the date of onset of claimant's symptoms

will be treated as the date of accident even though claimant continued working and performed his regular job duties until sometime after he gave notice on September 18, 1996.

The claimant admits to not having advised respondent before September 18, 1996, of the work-related nature of his injury. As this was more than ten days beyond the accident date, it violates the limitations set forth in K.S.A. 44-520. The Appeals Board finds claimant failed to provide notice of the accident within ten days pursuant to K.S.A. 44-520.

The Appeals Board must next consider whether claimant had just cause for failing to timely advise respondent of the accident. Respondent cites Rasmussen v. Metric Construction, Docket No. 225,773 (November 1997), in support of its position that claimant has not shown just cause for failing to timely notify respondent of his accident. In Rasmussen, the Appeals Board discussed several factors which should be considered in determining whether just cause exists. First, the fact finder must consider the nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually. In this instance, claimant did not describe a specific trauma or accident, but he did describe a specific incident on August 11, 1996, when the next morning after work, claimant was unable to get out of bed. This indicates the nature of the accident was a single traumatic event occurring on August 10 or 11, 1996.

The Appeals Board next must consider whether claimant was aware that he sustained an injury or accident on the job. Claimant described a specific incident on August 11, 1996. The Appeals Board finds claimant was aware that he had sustained an injury on that date, but at that time he was not aware he had sustained a work-related accident that he needed to report to his employer.

The Appeals Board next considers the nature and the history of claimant's symptoms. Again, a specific onset with a severe result is significant. It is also significant, however, that claimant's symptoms first manifested themselves at home, rather than at work, and were not associated with any particular work activity or trauma. It is also significant that claimant had experienced symptoms like this before that were temporary and fully resolved after a short period of time.

Finally, the Appeals Board considers whether the employee was aware or should have been aware of the requirements of reporting a work-related accident, and whether respondent posted notices required by the applicable version of K.A.R. 51-13-1, now K.A.R. 51-12-2(a), which stated in part:

Employers operating under this act shall post notices advising employees what to do in case of injury. Notices prepared by the Director for that purpose may be obtained by request to the Director.

In this instance, the record does not reflect whether or not a Form 40 was posted by respondent advising claimant of the obligations under the Workers Compensation Act. Claimant was apparently never advised by respondent that all accidents were to be reported immediately. Furthermore, claimant had never before suffered a work-related accident or had a workers compensation claim. Therefore, the Appeals Board finds that claimant was not aware that all accidents were to be reported immediately.

When just cause is an issue, the above factors should be considered on a case-by-case basis with each case being determined on its own facts. The Appeals Board finds, in this instance, persuasive evidence establishing that claimant was aware he suffered an injury but was not aware it was from a work-related accident. Neither was he aware of the significance of his symptoms. Claimant had experienced similar symptoms of stiff and sore muscles before that had resolved overtime. He thought that this would be the course his symptoms would follow again. This thinking was reinforced by claimant's chiropractor, who told claimant that he had a muscle strain and that it would go away. Claimant was able to continue working and did not miss any work due to this injury before he reported it to his supervisor, Gary Ruggles, on September 18, 1996. In fact, it was not until January 9, 1997, before claimant's herniated cervical disc condition was finally diagnosed. The Appeals Board finds, based upon the evidence in this case, that claimant has proven just cause for not notifying respondent within ten days of the date of accident as is required by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order For Medical Treatment dated April 16, 1998, entered by Administrative Law Judge Floyd V. Palmer should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Timothy G. Riling, Lawrence, KS
Clifford K. Stubbs, Lenexa, KS
Office of the Administrative Law Judge, Topeka, KS
Philip S. Harness, Director